No. 12774

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON PLYWOOD COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition to Set Aside Cease and Desist Order of Federal Trade Commission.

BRIEF FOR THE PETITIONER

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CEASE AND DESIST ORDER OF FEDERAL TRADE COMMISSION

Docket No. 5529. Issued Oct. 20, 1950 (R. 122-128).

The letter R used herein refers to the printed record, and the numbers following, to the pages of the printed record.

PLEADINGS

Amended complaint (R. 35).

Answer Oregon-Washington Plywood Company (R. 72).

Motion to dismiss proceedings (R. 92).

ACTION OF THE COMMISSION

Order denying motion to dismiss (R. 92).

Findings (R. 98-121).

Conclusions (R. 121-122).

Cease and Desist Order (R. 123-128).

JURISDICTION

Of the F.T.C.:

Amended complaint, issued pursuant to F.T.C. Act, approved Sept. 26, 1914, as amended March 21, 1938. U.S.C.A., Tit. 15, Ch. 2, p. 327 (R. 35).

Answer Oregon-Washington Plywood Company (R. 72).

Of this Court:

Petition to review and set aside order (R. 197).

Order served on Petitioner Nov. 6, 1950.

Petition to set aside order filed with Clerk of this Court, January 3, 1951, to which is attached affidavit in proof of service of copy with notice of filing on F.T.C. (R. 197).

Transcript of proceedings filed with Clerk of this Court by F.T.C.

Petitioner is an Oregon Corporation. Its principal business carried on in States of Oregon and Washington.

F.T.C. Act, supra, Section 5, sub. (c) and (d) (U.S. C.A. Title 15, Sec. 45, sub. c and d, page 334).

STATEMENT OF THE CASE

Petitioner, Oregon-Washington Plywood Company, is an Oregon corporation and is engaged in the manufacture and sale of plywood products. The F.T.C. issued and caused to be served an amended complaint against the Petitioner and fifteen other plywood manufacturers and dealers in plywood products, and the Douglas Fir Plywood Association, a non profit corporation formed for the purpose, among others, of advancing the common interest of manufacturers of and dealers in plywood products. It is charged that the respondents named in the amended complaint have engaged in an understanding, agreement, combination, conspiracy and planned common course of action among themselves and others, to restrict, restrain and suppress competition in the sale and distribution of plywood products to customers located throughout the several states. The various acts

and practices complained of are set forth in paragraph eight of the amended complaint (R. 51-54). The original complaint issued March 1, 1948, the amended complaint May 19, 1949 (R. 23 and 56).

On June 8, 1949, Petitioner filed with the Commission an answer to the amended complaint in which Petitioner admitted the material allegations of the complaint EXCEPT it denied that "the understanding, agreement, combination, conspiracy and common course of action alleged in the amended complaint, or that any agreement or understanding between the respondent (this Petitioner) and any of the other respondents named in the amended complaint, to fix or control prices or limit production of plywood or any commodities, continued or existed for any period of time subsequent to August 31, 1941." (R. 73).

No testimony was received in the proceedings. Time for taking testimony closed Sept. 30, 1949. On Nov. 14, 1949, Petitioner filed with the Commission a motion to dismiss the proceedings against it, based on the amended complaint and the answer (R. 92). The motion was denied.

Based solely on the amended complaint and the various answers, the Commission on October 10, 1950, signed FINDINGS which recited that the respondents (including this Petitioner) "during a substantial part of the period of time between May, 1935, and August 1, 1941, did engage in an understanding, agreement, combination, conspiracy and planned common course of action among themselves * * * to restrict, restrain and

suppress competition in the sale and distribution of plywood products to customers located throughout the several States * * *." (R. 109-110). The FINDINGS then set forth the various acts and things which the Commission claims was done during the period between 1935 and August 1, 1941 (R. 109-119). The Commission further found in the nature of a conclusion and without the benefit of any evidence, that the acts complained of *now* (Emphasis supplied) "* * * interfere with and curtail the production of plywood products and the sale of same in interstate commerce to dealers therein who, *but for the existence* (Emphasis supplied) of said understanding, agreement, combination and planned common course of action, would be able to purchase their requirements of said products from the manufacturers thereof." (R. 119). The FINDINGS detail other alleged results from the practices of the respondents between the period 1935 and August 1, 1941 (R. 119-120). The Commission did not find except by the way of the recital above quoted that the alleged practices of the respondents existed after August 1, 1941, or that there was any likelihood of the same being resumed. There was no evidence of the existence of any such practices or conduct subsequent to August 1, 1941, or of the effect such practices and conduct had on the production and sale of plywood products after that date.

The Commission concluded that the practices and conduct of the respondents "*were* all to the prejudice and injury of the public * * * *have* had a dangerous tendency to and *have* actually hindered and prevented competition * * * *have* unreasonably restrained such

commerce * * * and *have* constituted unfair methods," etc. (Emphasis supplied). The Commission did not expressly conclude, other than in the FINDINGS, that such practices had the effect attributed to them at the time the complaint was filed or at the time the order was entered (R. 121).

On October 20, 1950, the Commission issued its Cease and Desist Order which this Court is asked to set aside (R. 123-128). Eighteen of the other respondents against whom the Order was entered have petitioned to have it set aside.

ERRORS RELIED UPON

The Commission committed error in the following particulars:

I.

In not allowing the Petitioner's motion to dismiss the proceedings (R. 92) and in denying said motion.

II.

In finding that the acts and practices of the respondents named in the amended complaint, at the time the FINDINGS were signed, Oct. 20, 1950, or at any time subsequent to August 1, 1941, had the capacity, tendency and results to interfere with and curtail the production of plywood products and the sale of same in interstate commerce, or that such acts and practices at said times, or at any time subsequent to August 1, 1941, had any of the results or effect attributed to them by the Commission in paragraph nine of the FINDINGS (R. 119-120).

III.

In concluding that the acts and practices of the respondents as found, were all to the prejudice and injury of the public and of competitors of the respondents; have had a dangerous tendency to and have actually hindered and prevented competition in the sale of plywood products in interstate commerce; have unreasonably restrained such commerce in plywood products; and have constituted unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act (R. 121).

IV.

In signing and causing to be entered or promulgated the Cease and Desist Order, dated October 20, 1950 (R. 122-128).

(See POINTS, R. 211-215.)

STATUTES AND COURT DECISIONS RELIED UPON

F.T.C. Act, Tit. 15, Ch. 2, page 327, U.S.C.A.

U. S. vs. U. S. Steel Corp., 64 L. Ed., pp. 343-356 251 U.S. 417-445).

Industrial Assn. of S. F. vs. United States, 69 L. Ed. 849-856, at p. 856 (268 U.S. 64-84).

Galter vs. F.T.C., 7 Cir., 186 F. (2d) 810-816.

F.T.C. vs. Civil Service Training Bureau, 6 Cir., 79 F. (2d) 113-116.

L. B. Silver vs. F.T.C., (C.C.A.) 292 Fed. 752.

Eugene Dietzen Co. vs. F.T.C., 142 F. (2d) 321-332.

ARGUMENT

SUMMARY: The answer (R. 72) denies that the unlawful conduct and practices charged, continued or existed subsequent to August 31, 1941. No evidence was taken or considered (R. 90-91). The Commission found that the unlawful or improper conduct charged, was practiced during "a substantial part of the period of time between May, 1935, and August 1, 1941" (R. 109). The FINDINGS, paragraph 9, sub. (a) (R. 119) recite that dealers "who, but for the *existence* of said understanding, agreement, combination, conspiracy and planned common course of action, would be able to purchase their requirements of said products from the manufacturers thereof." (Emphasis supplied). It is not stated at what period of time said state of facts *existed*. As the answer expressly denies the existence of the practice charged subsequent to August 31, 1941, it is natural to assume that if the practice had been continued beyond that date, the Commission would have proved it.

There is nothing in the record to indicate that the practice charged in anyway restrained or affected commerce in plywood products subsequent to August 1, 1941. The findings that it did (R. 119, Par. 9) is a mere conclusion with no evidence to support it. If the result or effect of such practice continued after the practice was abandoned, the bad effects would not be remedied by ordering the participants in the practice to "cease and desist".

The purpose of the Federal Trade Commission Act is to stop a current or threatened illegal practice. Not to punish or stigmatize for conduct previously and voluntarily abandoned.

EXTENDED: Clearly, there is nothing in the record to establish any of the following things:

(a) That the illegal practice charged continued or existed after August 1, 1941, or that there is any danger or likelihood of the practice being resumed. Or,

(b) That the abandoned practice in any way restrained or affected commerce in plywood products at the time these proceedings were commenced—March 1, 1948, or at any time after August 1, 1941.

The Act empowers and directs the Commission to prevent the use of unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce (U.S.C.A., Title 15, Ch. 2, Sec. 45, p. 333). It provides, in effect, that if after hearing, the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by the Act, the Commission shall make a report stating its findings and shall issue and cause to be served on the perpetrator an order requiring such perpetrator to cease and desist from using such method of competition or such act or practice (Supra, Sec. 45 (b)). "Cease" means to stop. "Desist," is almost synonymous with "cease". The common dictionary meaning of the word is "to stop; cease from some action or proceeding; forbear" (Century Dictionary and Cyclopedia. Funk & Wagnalls New Standard Dictionary).

In United States vs. United States Steel Corp. it was charged that the United States Steel Corporation, and other corporations it controlled, were violating the Sherman Anti-trust Act, and the Government asked that the corporations be dissolved. In deciding the case Mr. Justice McKenna at page 351, 64 L. Ed. (251 U.S., p. 445), said:

> " * * * it is against monopoly that the statute is directed; not against an expectation of it."

Acts of infraction were recited and the Justice continued:

> " * * * They were scattered through the years from 1901 until 1911; but after instances of success and failure, were abandoned nine months before this suit was brought. There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them. * * * It is our conclusion, therefore, as it was that of the judges below, that the practices were abandoned from a conviction of their futility, from the operation of forces that were not understood or were underestimated, and the case is not peculiar. * * * What then can be urged against the corporation? * * *"

The decree of the District Court dismissing the suit was affirmed.

In Industrial Assn. of S. F. v. United States, the defendants were charged with engaging, and threatening to continue, in a conspiracy to restrain trade and commerce in building materials. The Court, by Mr. Justice Sutherland, 69 L. Ed. at page 856 (268 U.S., p. 84), after referring to some of the acts complained of, said:

> " * * * However this may be, and whatever may have been the original situation, the practice was abandoned long before the present suit was instituted, and nothing appears by the way of threat or otherwise to indicate the probability of its ever being resumed. Under these circumstances, there is no basis for present relief by injunction." (Quoting U. S. vs. U. S. Steel Corp., supra.)

In F.T.C. v. Civil Service Training Bureau, 6th Cir., 79 F. (2d) 113-116, the acts complained of were discontinued in 1932, the complaint was issued Sept. 16, 1933, at page 116, the Court, Allen, Circuit Judge, said:

> " * * * these practices were discontinued by respondent prior to Sept. 16, 1933, when the proceedings before the Commission were instituted. The Commission is not authorized to issue a cease and desist order as to practices long discontinued, and as to which there is no reason to apprehend renewal." (Quoting authorities.)

In Eugene Dietzgen Co. vs. F.T.C., 7th Cir., 142 F. (2d) 321-332, the complaint was issued March 29, 1937. Dietzgen Co. claimed to have discontinued the practice complained of March 4, 1938, nearly one year after the complaint was issued. The Court, by Evans, Circuit Judge, referred to the decision holding the order should not be issued where the practice had been abandoned, and to those holding, under certain conditions, that the discontinuance of the practice is not a bar to the issuance of the order, and said:

> "The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all of the facts, which include the attitude of the respondent toward the proceedings, the sin-

cerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued. On the other hand, parties who refuse to discontinue the practice until proceedings are begun against them and proof of their wrong doing obtained occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission —when it comes to entering the order.

"The object of the proceedings is to STOP the unfair practice."

The latest decision we have found on this subject, is Galter v. F.T.C., 186 F. (2d) 810-816, 7th Cir., Feb. 5, 1951. One of the practices complained of, was the deceptive use of three trade names. The Court (by Lindley, Circuit Judge), after referring to various decisions, at page 812, said:

" * * * we think that in determining whether the Commission has abused its discretion in ordering a petitioner to desist from an unfair practice which he has already halted, the Court is concerned largely not with the period of time which has elapsed between the cessation and the entry of the order but with the time from the date of cessation to the date of the issuance of the complaint."

The record showed the deceptive use of two trade names was not discontinued until more than a year after the issuance of the complaint.

If time is the important element, the facts are with the Petitioner. In this case the practice was discontinued

six years and seven months before the first complaint was issued.

We think the true test is, or should be, not so much the element of time, but *has the wrongful practice been discontinued and is there any evidence or strong probability of it being resumed?* On this point the Commission is authorized to use its discretion, but the discretion must be based upon established facts. It cannot be arbitrary. The Petitioner expressly denied that the practice charged continued or existed after August 31, 1941. The Commission accepted the answer as true and did not offer or receive any evidence. It did not find, based upon a presumption or otherwise, that the practice charged continued after August 1, 1941, or that there was any danger or likelihood of it being resumed. There was nothing before the Commission to justify the conclusion that the abandoned practice restrained competition or affected commerce in plywood products after August 1, 1941. If it did, an order to cease and desist from the practice discontinued for more than six years would not remedy the results of the abandoned practice, or justify the order.

We submit that as the Commission did not find that the practice charged continued or existed after August 1, 1941, or that there was any danger or probability of its being resumed, it could not have exercised any justifiable discretion in issuing the order.

Many decisions, the most of them mentioned in the two cases herein last quoted from, hold that the discontinuance of a practice after or shortly before proceedings

are commenced to stop it, is not always a defense against a cease and desist order, but the records and the facts in those cases are so different from this case, we think it would be of no assistance to the Court to relate and discuss them. We do not know of any case where the Courts have held a cease and desist order necessary or proper where the practice complained of had been abandoned or discontinued for any considerable time before proceedings were commenced to stop it and there was no threats or reasonable probability of the practice being resumed.

Respectfully submitted,

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